No. 49218-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jeffery Boatright,

Appellant.

Thurston County Superior Court Cause No. 16-1-00706-0

The Honorable Judge Anne Hirsch

Appellant's Opening Brief

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3. Mr. Boatright's conviction was entered in violation of his right to testify under the Fifth, Sixth, and Fourteenth Amendments and Wash. Const. art. I, §22.
4. The trial court erred by imposing restraints on Mr. Boatright in the absence of an impelling necessity.
5. The trial court erred by imposing restraints on Mr. Boatright without considering less restrictive alternatives.
6. The improper use of restraints during Mr. Boatright's jury trial undermined the presumption of innocence, interfered with his right to the assistance of counsel and his right to testify, and offended the dignity of the judicial process.

> **ISSUE 1:** An accused person may not be forced to attend trial in restraints absent an impelling necessity. Did the trial judge err by requiring Mr. Boatright to wear a leg brace absent proof that he posed an imminent risk of escape or of violence in the courtroom, or that he might disrupt proceedings?

7. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

> **ISSUE 2:** If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Jeffery Boatright is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The state charged Jeffrey Boatright with several counts of vehicle prowl. CP 3. He pleaded not guilty and took the charges to a jury trial. RP 31-220; CP 4.

Before the jury was selected, Mr. Boatright was brought up for trial by jail staff. They had, without any order from the court, dressed Mr. Boatright in a leg brace that would prevent him from being able to bend his knee. RP 12. The defense raised an objection and requested that the brace be removed. RP 12-13. The prosecutor argued that since Mr. Boatright was facing a prison sentence of 60 months, and because he had prior convictions for failure to register, the brace was needed to sure the courtroom. RP 14-15.

No party suggested or discussed options short of the leg hobble. RP 12-17. The court agreed with the state, adding that the fact the courtroom was small also meant the brace would be needed. RP 16-17.

The brace remained on Mr. Boatright during the entire trial. Mr. Boatright did not testify in his own defense. RP 220-236.

The jury convicted Mr. Boatright of all the charges, and he was sentenced to 60 months in prison. CP 29-39. Mr. Boatright timely appealed. CP 171-182.

ARGUMENT

I. THE TRIAL COURT SHOULD NOT HAVE FORCED MR. BOATRIGHT TO ATTEND TRIAL IN RESTRAINTS.

Mr. Boatright did not pose an imminent flight risk. Nor was there any indication that he intended to injure someone in the courtroom. There is no suggestion that he ever behaved inappropriately while in court.

Despite this, the trial judge forced him to attend his jury trial in restraints. The unnecessary imposition of restraints violated Mr. Boatright's constitutional rights to due process, to the assistance of counsel, and to testify. It also undermined the dignity of the judicial process.

A. The Court of Appeals should review *de novo* the trial court's decision to impose restraints.

Appellate courts review constitutional issues *de novo*. *Lenander v. Washington State Dep't of Ret. Sys.*, 186 Wn.2d 393, 403, 377 P.3d 199 (2016); *State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016). When a trial court makes a discretionary decision alleged to violate a constitutional right, review is *de novo*. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009).

Thus, for example, the *Jones* court reviewed *de novo* a discretionary decision excluding evidence under the rape shield statute

because the defendant argued a violation of his constitutional right to present a defense. *Jones,* 168 Wn.2d at 719.[1] Similarly, the *Iniguez* court reviewed *de novo* the trial judge's discretionary decisions denying a severance motion and granting a continuance, because the defendant argued a violation of his constitutional right to a speedy trial. *Iniguez*, 167 Wn.2d at 280-281. That court specifically pointed out that review would have been for abuse of discretion had not the defendant argued a constitutional violation. *Id.*

Prior to *Jones* and *Iniguez,* the Supreme Court reviewed a trial judge's decision imposing restraints during trial for abuse of discretion. *See, e.g., State v. Clark*, 143 Wn.2d 731, 773, 24 P.3d 1006 (2001) (quoting *State v. Finch*, 137 Wn.2d 792, 846, 975 P.2d 967 (1999)). The court has not revisited the issue since *Jones* and *Iniguez* clarified the standard of review for alleged constitutional violations stemming from discretionary decisions.

Following *Jones* and *Iniguez,* the correct standard of review is *de novo.* This court should review *de novo* the trial judge's decision to require Mr. Boatright to appear in restraints. Furthermore, "a court 'necessarily abuses its discretion by denying a criminal defendant's

[1] Generally, the exclusion of evidence under that statute is reviewed for an abuse of discretion. *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007).

(Continued)

constitutional rights.'" *Iniguez*, 167 Wn.2d at 280 (quoting *State v. Perez*, 137 Wash.App. 97, 105, 151 P.3d 249 (2007)).[2]

B. Mr. Boatright was entitled to attend trial free of shackles because there was no "impelling necessity" for physical restraint.

An accused person is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances. *Finch*, 137 Wn.2d at 844. Such extraordinary circumstances did not exist here: Mr. Boatright did not pose an imminent risk of escape, did not pose a threat to anyone in the courtroom, and behaved appropriately throughout the proceedings. Because the court improperly imposed restraints, his conviction must be reversed.

Restraints may not be used "'unless some *impelling necessity* demands the restraint of a prisoner to secure the safety of others and his own custody.'" *Id.*, at 842 (quoting *State v. Hartzog*, 96 Wn.2d 383, 398, 635 P.2d 694 (1981) (emphasis in *Finch*)). The record does not suggest that any impelling necessity required restraints in this case.

Restraints are disfavored because they undermine the presumption of innocence, restrict the defendant's ability to assist in the defense of his case, interfere with the right to testify, and offend the dignity of the judicial process. *Finch* , 137 Wn.2d at 845; *Hartzog*, 96 Wn.2d at 399.

[2] His conviction must be reversed even under an abuse of discretion standard.

Close judicial scrutiny is required to ensure that the inherent prejudice of restraint is necessary to further an essential state interest. *Finch,* 137 Wn.2d at 846.

A court may only impose restraints upon a showing that the accused person (1) poses an imminent risk of escape, (2) intends to injure someone in the courtroom, or (3) cannot behave in an orderly manner while in the court. *Finch,* 137 Wn.2d at 850.[3]

The bases for restraint advanced by the prosecutor do not suggest any of these three justifications. The prosecutor cited the "lengthy potential sentence" (60 months), Mr. Boatright's 1999 juvenile adjudication for attempting to elude, his 2002 community custody violation, and his four convictions for Failure to Register, and the "somewhat small" size of the courtroom. CP 8.[4]

The length of a potential sentence cannot justify restraint. Indeed, not even a potential death sentence implies an imminent risk of escape, violence, or disruptive behavior. *See, e.g., Clark*, 143 Wn.2d at 774 ("The state directs us to no evidence in the record, nor do we find any, that

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[3] Concern that a person is "potentially dangerous" is not sufficient. *Finch,* 137 Wn.2d at 852.

[4] Orally, the prosecutor admitted that he was not concerned about Mr. Boatright disrupting proceedings; he implied that his only concern was that Mr. Boatright might try to escape because he faced a five-year sentence and had a pattern of disobeying court orders. RP (6/27/15) 14-15.

would imply Clark posed a threat of violence, escape, or disruption"); *Finch*, 137 Wn.2d at 851 ("There is no indication from the record or the hearing on this matter that the Defendant posed a threat to anyone else in the courtroom, that the Defendant posed an escape risk, or that he had been disruptive during courtroom proceedings").

Nor does criminal history provide evidence of the required level of risk. *See, e.g., Clark*, 143 Wn.2d at 702-704 (finding reversible shackling error despite "extensive criminal history, which showed a pattern of violence toward others.")

Furthermore, absent evidence that Mr. Boatright posed a risk of violence, any concerns about the size of the court room amounted to a blanket policy of the type prohibited under *Hartzog*. *See Hartzog*, 96 Wn.2d at 383, 400.

The trial court's findings were not adequate to justify the imposition of restraints. The judge did not find an imminent risk of escape, any threat of violence, or a likelihood that he would disrupt proceedings. RP 16-17. Instead, the court imposed restraints based on the small size of the courtroom and his past "failure to comply with the court's orders." RP 16-17.

Before imposing restraints, a trial court must consider less restrictive alternatives. *Finch*, 137 Wn.2d at 850. The court did not do so

here. Mr. Boatright's conviction must be reversed and the case remanded for a new trial. *Id.*

C. The shackling error is presumed prejudicial and the state cannot prove it was harmless beyond a reasonable doubt.

The improper use of restraints is presumed to be prejudicial on direct appeal. *Clark*, 143 Wn.2d at 774; *In re Davis*, 152 Wn.2d 647, 698-699, 101 P.3d 1 (2004). The state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Jaquez*, 105 Wn. App. 699, 708, 20 P.3d 1035 (2001).

First, the state cannot prove beyond a reasonable doubt that the leg restraint was invisible to jurors. Although the judge said that she could not see it from the bench, she also indicated that Mr. Boatright sat near the venire during voir dire and next to the jury box during trial. RP 16-17.

Nothing suggests the court put up protective skirts to conceal the shackles at counsel's table. *Cf. Clark*, 143 Wn.2d at 777. Nor did the court make a record of the courtroom layout (other than to briefly describe Mr. Boatright's proximity to jurors and potential jurors).

Second, prejudice may attach even when jurors do not have the opportunity to see the restraints. *See, e.g., Davis,* 152 Wn.2d at 704–05 (reversing death penalty even though "No jurors saw Davis in shackles during the penalty phase.")

Third, the improper imposition of restraints can restrict an accused person's ability to assist in the defense, and can also interfere with the right to testify. In addition, imposition of restraints without adequate cause "offend[s] the dignity of the judicial process." *Finch,* 137 Wn.2d at 845. The state cannot prove beyond a reasonable doubt that these factors are inapplicable to Mr. Boatright's case.

The trial court should not have imposed restraints. The error is presumed prejudicial, and the state cannot prove the error was harmless beyond a reasonable doubt. *Finch*, 137 Wn.2d at 859. Accordingly, Mr. Boatright's conviction must be reversed and the case remanded for a new trial. *Id.,* at 866.

II. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should

it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016).[5]

Appellate costs are "indisputably" discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Jeffery Boatright indigent at the beginning and end of the proceedings in superior court. CP 4, 183. That status is unlikely to change, especially with the addition of a felony charge and imposition of a 60-month prison term. CP 29, 32. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

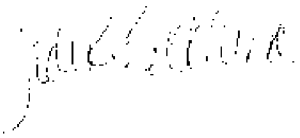
For the foregoing reasons, Mr. Boatright's conviction must be reversed and the case remanded for a new trial.

[5] Division II's commissioner has indicated that Division II will follow *Sinclair*.

If the state substantially prevails, the Court of Appeals should decline to impose appellate costs.

Respectfully submitted on December 21, 2016,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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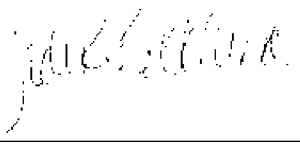
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 21, 2016.



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